



## **REPUBLIC OF KENYA**

### **IN THE HIGH COURT OF KENYA AT KISUMU**

#### **CRIMINAL APPEAL NO. 7 OF 2017**

**SAMUEL OBONYO AMAITSA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal against conviction and sentence in Criminal Case Number 189 of 2011 in the Chief Magistrate's Court at Kisumu delivered on 31st January, 2017 by Hon. J.Nga'rng'ar (CM) on behalf of L.Gitari (CM) as she then was)***

#### **JUDGMENT**

1. The appellant was charged with three counts. In the 1st count, he was charged with fraudulent acquisition of public property contrary to section 45(1) (a) as read with section 48(1) of the Anti-corruption & Economic Crimes Act. In the 2nd count, appellant was charged with forgery contrary to section 349 as read with section 348 of the Penal Code. In the 3rd count, appellant was charged with deceiving a principal contrary to section 41(2) as read with Section 48(1) of the Anti-corruption & Economic Crimes Act.

2. He was convicted on all the three counts. In the 1st count, he was sentenced to serve 4 years imprisonment with an additional fine of Kshs. 1,650,000/- and in default of payment to serve 1 year imprisonment. In the 2nd and 3rd counts, appellant was sentenced to serve 2 and 3 years imprisonment respectively.

#### **The prosecution's case**

3. The prosecution's case is that appellant was paid Kshs. 3,905,500/- vide a payment voucher PEXH. 1 which he signed as shown by the documents examiner's report PEXH. 47, to facilitate training for Water Resources Management Authority and Community Driven Development Officers. That the training took place for 4 days but appellant surrender payment vouchers and attendance lists for 9 days. Appellant surrendered the imprest by Voucher No. 0744 PEXH. 48 supported by payment vouchers and attendance lists marked PEXH. 2, 3, 4 and 5 which the participants denied signing. The document examiner further confirmed that the writing and signatures on the four payment vouchers and attendance lists were made by the appellant.

#### **The Defence Case**

4. When he was put on his defence, the appellant gave unsworn testimony in which he denied the offence. He denied receiving Kshs. 3,905,500/- as shown on payment voucher PEXH. 1 and stated that he received Kshs. 2,849,500/which he surrendered. He stated that he could not account for Kshs. 882,000/- that he did not receive.

#### **The appeal**

5. Being dissatisfied with the conviction and sentence, appellant lodged the instant appeal. In the petition of appeal filed on 7th February, 2017, appellant raised 6 grounds of appeal which I have summarized into 5 grounds to wit:

**1. That the learned magistrate erred in law and in fact by convicting without sufficient evidence from the management team which included the CO, Finance Officer and Accounting in charge of imprest who were essential witnesses who would have shed light on the matter**

**2. That the learned magistrate erred in law and in fact by convicting without noticing that he was falsely implicated in the case**

**3. That the learned magistrate erred in law and in fact by convicting him on weak prosecution case**

**4. That the learned magistrate erred in law and in fact to convict not taking into account that his role in the payment of the**

participants was not thoroughly investigated

**5. That the learned magistrate erred in law and in fact by convicting without taking into account his defence which was strong**

### **Submission**

6. When the appeal came up for hearing on 30th January, 2018, the appellant through his advocate Mr. Omondi relied on written submission filed on 23rd January, 2018. In addition, Mr. Omondi submitted that there was PW21, the document examiner did not positively identify the signature on the payment voucher as belonging to the appellant. In her oral submissions, Ms. Wafula, for the appellant stated that the evidence by PW2 proved that appellant received Kshs. 3,905,500/-. She submitted that the document examiner had established that appellant made the 4 payment schedules for Kshs. 825,000/- which the participants who were alleged to have been paid the said sum denied.

### **Analysis and Determination**

7. This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of ***David Njuguna Wairimu v. Republic [2010] eKLR*** pronounced itself as hereunder:-

*“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.*”

8. The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that.

9. It is on record that appellant signed an imprest payment voucher PEXH. 1 acknowledging receipt of Kshs. 3,905,500/-. Appellant cannot therefore be heard to deny that he received the Kshs. 3,905,500/- that he signed for.

10. There is evidence that appellant accounted for Kshs. 2,849,500/ in the form of payment vouchers and participants attendance lists. Among them were payment vouchers and participants lists marked PEXH. 2, 3, 4 and 5 for the sum of Kshs. 825,000/-. Participants who were alleged to have been paid denied signing the payment vouchers and attendance lists surrendered by the appellant in support of the expenditure of Kshs. 825,000/-.

11. The documents examiner in his report PEXH. 47 stated that after examining the signatures and handwritings on the said payment vouchers as against appellant's signatures and handwritings, he formed an opinion that they were made by the same hand.

12. From the above analysis, I find that the learned trial magistrate rightfully found that appellant had fraudulently acquired public property in the sum of Kshs. 825,000/- received by him in the form of imprest and which he failed to surrender or account for. The fact that appellant made documents to try and cover up the sum of Kshs. 825,000/- receives court in no doubt that the said sum was indeed received by him.

13. On the basis of the documents examiner report PEXH. 47 that appellant made the schedules PEXH. 2, 3, 4 and 5 for the sum of Kshs. 825,000/-, I find that the learned trial magistrate's finding that the offence of forgery had been proved was well founded.

14. Similarly, I find that the trial magistrate's decision that appellant surrendered schedules marked PEXH. 2, 3, 4 and 5 which he knew were false and misleading was also well considered.

### **Decision**

15. In view of the foregoing analysis, I reach a conclusion that the case against the appellant was proved beyond any reasonable doubt rendering the conviction safe. The appeal is thus disallowed. The conviction is confirmed and the sentence upheld. It is so ordered.

**DATED AND DELIVERED THIS 15th DAY OF March, 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - **Felix & Carolyne**

Appellant - **Mr Odeny/Mr M.Omondi**

For the State - **Ms Wafula**